



Robert Schuman

*Modernization of European Competition Law  
as a Form of Convergence*

- Andre Fiebig



Jean Monnet/Robert Schuman Paper Series  
Vol. 4 No. 6  
July 2004

**This publication is sponsored by the EU Commission.**

## The Jean Monnet/Robert Schuman Paper Series

The Jean Monnet/Robert Schuman Paper Series is produced by the Jean Monnet Chair of the University of Miami, in cooperation with the Miami European Union Center.

These monographic papers address issues relevant to the ongoing European Convention which concluded in the Summer of 2003. The purpose of this Convention was to submit proposals for a new framework and process of restructuring the European Union. While the European Union has been successful in many areas of integration for over fifty years, the European Union must take more modern challenges and concerns into consideration in an effort to continue to meet its objectives at home and abroad. The main issues of this Convention were Europe's role in the international community, the concerns of the European citizens, and the impending enlargement process. In order for efficiency and progress to prevail, the institutions and decision-making processes must be revamped without jeopardizing the founding principles of this organization. As the member states negotiate the details of the draft constitutional treaty, the Jean Monnet/Robert Schuman Papers will attempt to provide not only concrete information on current Convention issues but also analyze various aspects of and actors involved in this unprecedented event.

The following is a list of tentative topics for this series:

1. The challenges of the Convention: the ability to govern a supranational Europe or the return to intergovernmental cooperation?
2. How did the member states figure in the framework of the Convention?
3. The necessity to maintain a community method in a wider Europe.
4. Is it possible for the member states to jeopardize the results of the Convention?
5. The member states against Europe: the pressures on and warnings to the Convention by the European capitals.
6. Is it possible that the Convention will be a failure? The effects on European integration.
7. Similarities and differences between the European Convention and the Philadelphia Convention of 1787.
8. The role of a politically and economically integrated Europe in the governance of the world.
9. How important is European integration to the United States today?
10. The failure of a necessary partnership? Do the United States and the European Union necessarily have to understand each other? Under what conditions?
11. Is it possible to conceive a strategic partnership between the United States, the European Union and Russia?
12. Russia: a member of the European Union? Who would be interested in this association?

Miami European Union Center  
University of Miami  
1531 Brescia Avenue  
Coral Gables, FL 33146-3010  
Phone: 305-284-3266; Fax: 305-284-4875  
E-Mail: [jroy@miami.edu](mailto:jroy@miami.edu)  
Webs: [www.miami.edu/international-studies/euc](http://www.miami.edu/international-studies/euc)  
[www.euroy.org](http://www.euroy.org); [www.miamieuc.org](http://www.miamieuc.org)

### **Jean Monnet Chair Staff:**

Joaquín Roy (Director)  
Aimee Kanner (Editor)  
Roberto Domínguez (Research Assistant)  
Nouray Ibryamova (Research Assistant)  
Markus Thiel (Research Assistant)

---

## Modernization of European Competition Law as a Form of Consensus

---

Andre Fiebig\*

The Jean Monnet Chair  
University of Miami  
Miami, Florida  
July 2004

---

\* Co-chair, EU Law Interest Section, European Union Studies Association (EUSA); Garner Carton & Douglas, Chicago, IL. A graduate of Chicago-Kent College of Law, he received masters and doctorate degrees from the University of Tübingen in Germany. He is the author of numerous law review and journal articles on various topics concerning European business law. He currently is a Co-Chair of the EU Law Interest Section of the European Union Studies Association and Co-Vice Chair of the Foreign and International Competition Law Committee of the ABA's Section on Antitrust, and an adjunct professor at Northwestern University School of Law where he teaches European Business Law. He has practiced law in Brussels, Belgium and served as an attorney with the U.S. Department of Energy in Washington, D.C. He is currently a partner in the law firm of Gardner, Carton & Douglas, practicing in the area of international business law with a particular emphasis on antitrust and competition law, joint ventures, distribution, data privacy and e-commerce.

## MODERNIZATION OF EUROPEAN COMPETITION LAW AS A FORM OF CONVERGENCE

---

*The necessity for the continuous adaptation of the law to the needs of time, if the law is not eventually to break down, is a fundamental problem deserving of extensive consideration.*

- Arthur T. Vanderbilt, *The Modernization of the Law*, 36 CORNELL L.Q. 433, 433 (1951)

### Introduction

Historians of European competition law will undoubtedly consider 1 May 2004 an epoch. On this date, not only will the European Union (“EU”) experience its largest single growth when ten new countries accede to the EU,<sup>1</sup> but also a number of major reforms of European competition law will become effective. Although the competition law reforms address a broad array of specific issues, they are generally considered an attempt by the Commission to modernize its competition law enforcement to create greater administrative efficiency and reduce compliance costs on firms. The modernization efforts should not be viewed in a vacuum. They are taking place at a time of increased public awareness of the tension between European and U.S. competition law. The divergent results reached by the U.S. and European antitrust agencies in the Boeing/McDonnell Douglas,<sup>2</sup> Microsoft<sup>3</sup> and GE/Honeywell<sup>4</sup> cases are just three examples of the public attention which the parallel application of competition law in a globalized world can attract when it leads to different results. Harmonization has been proposed as a method by which to address the conflict which often ensues from the parallel application of the competition laws. Although the European Commission has not formally recognized convergence with U.S. antitrust law as one of the objectives of the modernization process, this will be one of the unintended results. This contribution will first identify the main components of the European Commission’s modernization efforts. It will then explain how the modernization will result in convergence between U.S. and European competition law.

---

<sup>1</sup> On May 1, 2004, the following countries will become members of the European Community thereby increasing the number of Member States to 25: Malta, Slovenia, Poland, Slovakia, Hungary, Latvia, Czech Republic, Estonia, Lithuania and Cyprus.

<sup>2</sup> Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement, O.J. 1997 (L 336) 16 (Boeing/McDonnell Douglas).

<sup>3</sup> Commission Press Release, *Commission gives Microsoft last opportunity to comment before concluding its antitrust probe*, IP/03/1150, Aug. 6, 2003; *DoJ’s James warns EC against use of ‘monopoly leveraging’ argument in Microsoft*, GLOBAL COMPETITION REVIEW, May 20, 2002 available at [http://www.globalcompetitionreview.com/news/news\\_item.cfm?item\\_id=264](http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=264).

<sup>4</sup> Commission Decision of 3 July 2001 declaring a concentration incompatible with the common market and the EEA Agreement, O.J. 2004 (L 48) 1 (General Electric/Honeywell); Stefan Schmitz, *How Dare They - European Merger Control and the European Commission’s Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT’L ECON. L. 325 (2002).

## Objectives of the Modernization Program

Modernization is all the rage. Whereas the European Commission introduced its modernization program several years ago, the United States recently created an Antitrust Modernization Commission which is charged with preparing a report on the necessity of modernization of U.S. antitrust laws.<sup>5</sup> The modernization initiatives being discussed in the United States were prompted primarily by the perceived inability of the existing legal norms to appropriately address new forms of commerce and the increased importance of intellectual property. In contrast, the modernization efforts in the EU were in response to the regulatory inefficiencies and the burdens which the traditional enforcement of the competition laws imposed. As early as 1996, the Commission recognized that “the current political and economic situation necessitates the continuous modernization of the instruments and procedures available to the Commission, in order to improve the relevance, efficiency and transparency of competition policy.”<sup>6</sup>

The notion of efficiency, which is commonly applied to the conduct of private commercial actors, has been used to gauge administrative behavior. In general, the modernization effort in the EU is designed to increase efficiency in the enforcement of the European competition rules.<sup>7</sup> Competition is used by market economies to determine the proper allocation of scarce resources. Ironically, there is a general consensus in free market economies that the proper functioning of a “free” market necessitates state intervention in the market. In other words, competition is not considered to be self-regulating. Moreover, a purely competitive market will not always yield the most socially desirable or politically acceptable results. These recognitions legitimize state intervention in the competitive process in the form of the enforcement of legal norms prohibiting certain business conduct. State intervention results in outcomes which the market would not otherwise render. Determining when and how to intervene requires significant administrative resources. Moreover, compliance with the legal norms designed to protect competition and with the regulatory procedures adopted to assist in that process imposes costs on firms. From an administrative efficiency perspective, these costs should only be imposed on firms engaged in conduct which the legal norms applicable in that territory consider to be anti-competitive. An efficient competition law regime is that which achieves the objectives of the legislation while imposing the lowest costs on the state and the subjects of the law. Anti-competitive conduct should not go undetected; but pro-competitive conduct should not be burdened.

Similar to the Sherman Act, the European competition laws codified in Articles 81 and 82 of the EC Treaty<sup>8</sup> are formulated in broad terms. They basically prohibit unilateral, bi-lateral and multilateral restraints of competition. In recognition of the broad character of the prohibition, the drafters of the Treaty of Rome empowered the Council in Article 83(1) of the EC Treaty to adopt the appropriate regulations or directives to give effect to the prohibitions contained in Articles 81 and 82 of the EC Treaty. In reliance on this authority, the Council adopted Regulation 17 in

---

<sup>5</sup> 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

<sup>6</sup> Commissioner Karel Van Miert, Presentation of 25th Report on Competition Policy, European Parliament (May 30, 1996) available at [http://europa.eu.int/comm/competition/speeches/text/sp1996\\_044\\_en.html](http://europa.eu.int/comm/competition/speeches/text/sp1996_044_en.html).

<sup>7</sup> See Philip Lowe, *Priorities of Competition Policy, Contribution to Competitiveness and Challenges from Enlargement*, Speech at the ProbusBNW Dialogue (Sept. 18, 2003) at 2.

<sup>8</sup> Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 *as amended* [hereinafter EC Treaty].

1962.<sup>9</sup> Although Regulation 17 was adopted before the Community had significant experience with the application of the competition laws, it survived with relatively few changes for 42 years.

Regulation 17 was adopted at an early stage in the development of European competition law. Although it worked effectively (with some creative interpretations by the Commission and the European Court of Justice) for several decades, there was general, but not uniform recognition that revisions were necessary.<sup>10</sup> The term “modernization” as currently employed in European competition law circles refers to changes in the enforcement of Articles 81 and 82 of the EC Treaty and in particular Regulation 17. The fundamental objectives of the reform efforts are to facilitate a reallocation of administrative and enforcement resources, promote the decentralized application of the competition rules and reduce the compliance costs imposed on firms.<sup>11</sup> The changes are codified in Council Regulation 1/2003 which comes into force on May 1, 2004 and replaces Regulation 17.<sup>12</sup> According to the preamble of Regulation 1/2003:

[T]here is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. ...The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.<sup>13</sup>

## Parallel Reform Efforts

The modernization program involving the enforcement of Articles 81 and 82 of the EC Treaty is just one component in a broader effort to enhance the efficiency of the application of the European competition laws and, by reducing the compliance costs on European firms, increase the competitiveness of European industry in a globalized economy.<sup>14</sup> As it is sometimes difficult for the casual observer to maintain an understanding of all of the reform efforts in the field of

---

<sup>9</sup> Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

<sup>10</sup> The Germans were the most vociferous opponents of the reform effort. Möschel, *Ex ante-Kontrolle versus ex post-Kontrolle im Recht der Wettbewerbsbeschränkungen*, 52 JAHRBACH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 63, 68 (2001); Mestmäcker, *Versuch einer kartellpolitischen Wende in der EU - Zum Weißbuch der Kommission über die Modernisierung der Vorschriften zur Anwendung der Artt. 85 und 86 EGV a.F. (Artt. 81 und 82 EGV n.F.)*, 17 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 523-529 (1999); Karsten Schmidt, *Umdenken im Kartellverfahrensrecht!*, 2003 BETRIEBS-BERATER 1237.

<sup>11</sup> White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, O.J. 1999 (C 132) 1 at ¶42.

<sup>12</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty, O.J. 2003 (L 1) 1 [hereinafter Regulation 1/2003].

<sup>13</sup> Preamble points 2 & 3 Regulation 1/2003.

<sup>14</sup> The EU has been engaged in an extended effort to examine ways to promote the competitiveness of European businesses. Communication from the Commission to the Council, the European Parliament, the Committee of the Regions and the Economic and Social Committee, *The competitiveness of European enterprises in the face of globalisation: how it can be encouraged*, COM (1998) 718 final (Jan. 20, 1999). The modernization of the competition laws is just one aspect of this overall program.

competition law, a brief summary of the other major projects currently underway or reforms recently adopted may be of assistance.

### *Reform of the Block Exemptions*

Ancillary to the modernization program, the European Commission is in the process of revising (or has recently revised) several of the “block exemptions.” Block exemptions are regulations which identify categories of agreements which benefit from the exception provided for in Article 81(3) of the EC Treaty. Article 81(1) of the EC Treaty prohibits restraints of competition which may have an effect on trade between the EU member states. Article 81(3) of the EC Treaty identifies four requirements which, if cumulatively fulfilled, allow conduct infringing Article 81(1) to be permitted because of its redeeming characteristics. According to Article 81(3) of the EC Treaty, the prohibition of anti-competitive conduct codified in Article 81(1) may be declared inapplicable if the conduct contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. However, the conduct must only impose on the undertakings concerned restrictions which are necessary to the attainment of the redeeming objectives and must not afford the firms the possibility of eliminating competition in respect of a substantial part of the relevant products or services. As the requirements for an exemption are phrased in broad terms, the block exemptions attempt to apply those standards to specific agreements and even clauses.<sup>15</sup> Although the various block exemptions are different, they generally identify, for each type of agreement to which they apply, the types of clauses which are permissible, those which are prohibited and those which may be permissible in certain circumstances. As the introduction of the new rules during the modernization process will require firms and their legal advisors to apply the requirements of Article 81(3) of the EC Treaty without the possibility of notifying the agreement to the European Commission, these revised block exemptions will be important to the success of the modernization efforts.

### *Introduction of New Merger Control Regulation*

The Commission has also been intensely preoccupied with the reform of the Merger Control Regulation for the last several years. Until 1989, the Commission did not have a law which adequately applied to structural restraints of competition. Article 81 of the EC Treaty was directed at bi-lateral or multilateral restraints of competition. Article 82 of the EC Treaty applied to unilateral restraints of competition.<sup>16</sup> In recognition of this shortcoming, the Council adopted

---

<sup>15</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, O.J. 1999 (L 336) 21; Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, O.J. 2002 (L 203) 30; Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements, O.J. 1996 (L 31) 2 (currently being revised); Commission Regulation No. 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, O.J. 2003 (L 53) 8.

<sup>16</sup> Although Article 82 was sometimes applied to mergers prior to the introduction of the first Merger Control Regulation, this was an inadequate solution as it did not prevent the merger from occurring. Case 6/72,

the Merger Control Regulation in 1989.<sup>17</sup> The law was revised in 1997 to capture mergers which had to be notified in several Member States.<sup>18</sup> This time, the Commission decided to adopt an entirely new Regulation which builds upon the experience and problems which the Commission has encountered over the last 14 years of merger control.<sup>19</sup>

In addition to a number of procedural changes relating to the allocation of jurisdiction between the Commission and the Member States and the various time periods for submission and review of notifications, the revised Merger Control Regulation changes the substantive test which is employed by the Commission to determine whether a change in the structure of competition as a result of the merger is to be approved.<sup>20</sup> Previously, the standard for determining the permissibility of a merger was whether the transaction created or strengthened a dominant position. The new standard is whether the merger “significantly impede[s] effective competition ... in particular as a result of the creation or strengthening of a dominant position.”<sup>21</sup> As with many European legal norms, the unnecessarily confusing formulation of the substantive standard – arguably the most important provision of the law – is the result of a political compromise between the Member States which advocated the adoption of a test similar to that of the U.S. (whether the merger substantially lessens competition) and those Member States which advocated retaining the original substantive test (whether the merger creates or strengthens a dominant position). The practical significance of the introduction of this new standard remains to be seen. The recitals to the Merger Control Regulation suggest that the notion of “significant impediment to effective competition” is only meant to extend the traditional standard to mergers which will result in co-ordination between non-dominant firms (“unilateral effects” in U.S. antitrust parlance).<sup>22</sup> The prior Merger Control Regulation did not apply in such cases as it was limited to the creation or strengthening of a dominant position.

### *Institutional Reforms*

Finally, the Commission has recognized that the internal structure of the Competition Directorate did not enhance the efficient application of the competition laws. Consequently, it has exhibited a willingness to restructure the Competition Directorate in several meaningful ways.<sup>23</sup> When the Merger Control Regulation was introduced in 1990, the Commission created a Merger Task Force within the Competition Directorate (then DGIV) with responsibility for review of

---

*Europemballage and Continental Can v Commission*, 1973 E.C.R. 215. The Commission was consequently forced to unwind the merger if it was considered an abuse of a dominant position.

<sup>17</sup> Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. 1989 (L 395) 1.

<sup>18</sup> Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertaking, O.J. 1997 (L 180) 1.

<sup>19</sup> Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. 2004 (L 24) 1 [hereinafter Merger Control Regulation].

<sup>20</sup> The Commission’s Notice on Horizontal Mergers will enter into force on the same date as the Merger Control Regulation. In that Notice, the Commission recognizes the importance of efficiencies in the substantive review of mergers.

<sup>21</sup> Article 2(2) Merger Control Regulation.

<sup>22</sup> Recital 25 Merger Control Regulation.

<sup>23</sup> Commission reorganises its Competition Department in advance of Enlargement, IP/03/603 (April 30, 2003).

mergers.<sup>24</sup> The Commission has decided to integrate the Merger Task Force into the rest of the Competition Directorate. The Merger Task Force will continue as a small staff responsible for the coordination (but not substantive review) of merger cases across the EU. The members of the Merger Task Force have been integrated into the sector-specific units of the Competition Directorate. In addition, each of the sector-specific units will be responsible for the detection of cartels, a task that was previously in the hands of a separate unit. The Commission felt that this sector-specific approach would assist in a more efficient application of the laws because of the enhanced understanding of specific industries which will be gained by the individuals working in these units. Finally, in a development which warms the heart of many U.S. practitioners, the Commission has introduced the office of Chief Economist reporting directly to the Director General who is head of the Competition Directorate. This development is meant to assuage the concerns and criticisms of many that the competition law decisions of the European Commission – particularly merger decisions – are wanting of proper economic rigor.

### **The Main Components of the Commission’s Modernization Program**

Modernization, in a narrow sense, refers specifically to the introduction of Regulation 1/2003 and the “modernization package” comprised of six notices issued by the European Commission to assist in the interpretation and application of the new rules codified in Regulation 1/2003. Although Regulation 1/2003 introduces a large number of changes, only the main components are addressed here.

#### *Abolition of Antiquated Notification System*

Article 81(1) of the EC Treaty prohibits agreements and concerted practices between undertakings and decisions of associations of undertakings which appreciably restrict competition and have an effect on trade between Member States. Conduct which falls under this prohibition is automatically void unless it satisfies the requirements for an exception under Art. 81(3) of the EC Treaty. Under Regulation 17, the parties were required to apply to the Commission for an individual exemption. Conduct which fulfilled the requirements set forth in Art. 81(3) could not benefit from an exemption unless a notification was submitted to the Commission.

Because of the very broad interpretation given to the notion of “restriction of competition” in the context of Art. 81(1) of the EC Treaty, this system created almost a presumption of illegality. Moreover, the early rejection of the U.S. rule of reason approach to identifying restraint of competition resulted in a flood of notifications beyond what the Commission could handle. Article 81(1) and Section 1 of the Sherman Act are similar in that they both essentially prohibit restraints of competition. In *Standard Oil v. U.S.*, the U.S. Supreme Court recognized that contracts by their very nature restrict the commercial freedom of the parties and held that not every restraint of the commercial freedom of a market actor is to be equated with a restraint of competition for purposes of antitrust law.<sup>25</sup> Only agreements which

---

<sup>24</sup> See JOSE RIVAS, THE EU MERGER REGULATION AND THE ANATOMY OF THE MERGER TASK FORCE (2000).

<sup>25</sup> 221 U.S. 1 (1911).

are “unreasonable” were prohibited. Under the “rule of reason,” the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be considered a restraint of competition.<sup>26</sup>

The Europeans rejected this approach relatively early. As a result of the German influence,<sup>27</sup> particularly in the initial stages of development of the European competition law regime, the Commission<sup>28</sup> and the Court<sup>29</sup> have traditionally equated a restraint of competition in the context of Art. 81(1) EC Treaty with a restraint of the commercial freedom of an otherwise autonomous market actor. In applying Art. 81(1) of the EC Treaty, the Commission and Courts have traditionally disregarded the pro-competitive effects or “efficiencies” of the agreement. In fact, the Court has expressly refused to apply a rule of reason in the content of Art. 81(1).<sup>30</sup> The test applied by the Commission and hence practitioners was whether the agreement restricted the commercial freedom of one of the parties or a third party. The redeeming characteristics were only considered in the context of Art. 81(3) of the EC Treaty which only applied if the parties notified the transaction to the Commission.

Regulation 1/2003 does not introduce a new substantive standard or interpretation of the concept “restraint of competition.” It does, however, eliminate the bifurcated approach to the application of Art. 81 of the EC Treaty. Regulation 1/2003 abolishes the requirement that parties must submit a notification to the Commission in order to take advantage of the exemption possibility under Art. 81(3). In the new system, conduct which violates Art. 81(1) of the EC Treaty but which satisfies the conditions for an exemption under Art. 81(3) EC Treaty is automatically exempted from the prohibition.<sup>31</sup> The Commission refers to this as the “legal

---

<sup>26</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

<sup>27</sup> For a discussion of the various influences on the development of European competition law see DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE (1998) 164; David J. Gerber, *Constitutionalizing the Economy: German Neoliberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. L. 25 (1994). Although it is extremely difficult to quantify the German influence on the early development of European competition law, a reading of the transcripts of the Proceedings of the Conference on Antitrust and the European Communities which was held in Brussels and Luxembourg in September of 1963 make this influence evident. Most of the Germans active in the field of competition law at the European level were nurtured in the ordo-liberal tradition. Ordo-liberal economics places a primary emphasis on individual freedom. The fundamental purpose of competition policy from an Ordo-liberal perspective is “the protection of individual economic freedom of action as a value in itself.” Wernhard Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, 157 J. INSTITUTIONAL & THEORETICAL ECONOMICS 3, 4 (2001). Consequently, a restraint of competition was conceptually equated with a restraint of the commercial freedom of market actors.

<sup>28</sup> *Visa International*, O.J. L 318 (2002) 17 ¶64; *BP/Kellogg*, O.J. L 369 (1985) p. 6 ¶ 15; *UIP*, O.J. 1989 (L 226) 25 ¶40; Commission, 23<sup>rd</sup> REPORT ON COMPETITION POLICY (1994) ¶ 160; *Industrieverband Solnhofener Natursteinplatten*, Commission Decision of Oct. 16, 1980, O.J. 1980 (L 318) 32 ¶27; *Toltecs-Dorcet*, Commission Decision of Dec. 15, 1982, O.J. 1982 (L 379) 19 ¶II.3(a); Commission Decision of July 15, 1992, O.J. 1992 (L 233) 27 ¶16; *Junghans*, Commission Decision of Dec. 21, 1976, O.J. 1977 (L 30) 10 ¶21; *DSD*, Commission Decision of Sept. 17, 2001, O.J. 2001 (L 319) 1 ¶123; *Nathan-Bricolux*, Commission Decision of July 5, 2000, O.J. 2000 (L 54) 1 ¶75.

<sup>29</sup> Case T-65/98, *Van den Bergh Foods Ltd v. Commission*, 2003 E.C.R. \_\_\_ ¶98; Case C-306/96, *Javico International and Javico AG v. Yves Saint Laurent Parfums SA*, 1998 E.C.R. I-1983 ¶13; Case 193/83, *Windsurfing International v. Commission*, 1986 E.C.R. 611, 653; Case 107/82, *AEG v. Commission*, 1983 E.C.R. 3151 ¶60; Case 86/82, *Hasselblad v. Commission*, 1984 E.C.R. 883, 908.

<sup>30</sup> The reasoning adopted by the Court was that the application of a rule of reason in the context of Art. 81(1) would void the Art. 81(3) exception of any meaning. Case T-65/98, *Van den Bergh Foods Ltd. v. Commission*, 2003 E.C.R. \_\_\_ ¶106; Case T-112/99, *Métropole télévision v. Commission*, 2001 E.C.R. II-2459, ¶77.

<sup>31</sup> Article 1(2) Regulation 1/2003.

exception system.”<sup>32</sup> The Commission has indicated, however, that in cases which present novel legal questions, it would be prepared to issue “guidance letters” to the parties.<sup>33</sup>

The significance of the abolition of the notification requirement is greater than may be readily apparent. Prior to the introduction of the reforms, the application for an exemption under Art. 81(3) of the EC Treaty was subject to detailed rules and compliance with an extensive notification form.<sup>34</sup> If the notification system was designed to detect illicit anti-competitive agreements, it was not a success. There have been relatively few instances in which a notification not prompted by a complaint resulted in a finding of anti-competitive agreement.<sup>35</sup>

The abolition of the notification requirement will also have an effect on the strategic approach taken by practitioners to joint ventures. In the old regime, there were certain benefits of qualifying as a concentration with a Community dimension under the Merger Control Regulation. In such cases, the application of Art. 81 of the EC Treaty and national law to the transaction was precluded, and the Commission had a set timeframe in which to review and approve or contest the transaction. Upon the expiry of that time, the parties had legal certainty that their transaction was commensurate with applicable European competition law. Notifications for exemption under Art. 81(3) of the EC Treaty, however, fell into the European Commission’s black hole. The Commission was under no legal time pressure to review and pass judgment on the notification. It was not uncommon for the Commission’s review to take three years. In the new regime, however, the time consideration for attempting to avoid the application of Art. 81 of the EC Treaty by structuring the transaction as a concentration no longer exists. In fact, the parties no longer even have the opportunity to file a notification. From a purely time perspective, then, the review process under the Merger Control Regulation is longer than the application of Art. 81 of the EC Treaty.

There are, however, tradeoffs. Parties, whose transaction falls under the Merger Control Regulation, will have the legal certainty that they are in compliance with applicable European competition law. In the system introduced by Regulation 1/2003, the parties will not know for certain whether their agreement amounts to a restraint of competition or even qualifies for an exemption.<sup>36</sup> Moreover, the Merger Control Regulation precludes the application of Member State law altogether.<sup>37</sup>

### *Relinquishment of the Exemption Monopoly*

Not only will the exception be automatically applicable, the national competition authorities will now have the authority to determine whether the requirements of Art. 81(3) of the EC Treaty are

---

<sup>32</sup> Commission, 22nd REPORT ON COMPETITION POLICY (2002), SEC(2003) 467 final, at 16 ¶17.

<sup>33</sup> Mario Monti, *EU Competition Policy After May 2004*, SPEECH/03/489 (Oct. 24, 2003) at 5.

<sup>34</sup> Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17, O.J. 1994 (L 377) 28.

<sup>35</sup> Alexander Schaub, *Modernization of EC Competition Law: Reform of Regulation No. 17*, 23 *FORDHAM INT’L L.J.* 752, 753 (1999-2000).

<sup>36</sup> Although the Commission has declared the willingness to provide guidance letters, it will only do so for novel legal questions or factual constellations.

<sup>37</sup> Article 21(3) Merger Control Regulation.

fulfilled.<sup>38</sup> Under Regulation 17, the European Commission had a monopoly on this right. The fundamental purpose of the relinquishment of the exemption monopoly is to allow the Commission to allocate greater resources to the detection of more severe restraints of competition.<sup>39</sup>

The application of Article 81(3) of the EC Treaty by the national competition authorities and courts will present two major challenges. The first challenge arises out of the ambiguous wording of Article 81(3). The exception requirements of Art. 81(3) of the EC Treaty are inherently vague, and perhaps purposely so.<sup>40</sup> Under this provision, conduct which infringes Art. 81(l) may be permitted if the conduct “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.” The application by the various Member States of this ambiguous standard in the absence of established case law or even an agreed legal tradition would have threatened the effectiveness of a European competition law regime. Primarily for that reason, only the Commission was permitted to grant exceptions under Art. 81(3) of the EC Treaty.<sup>41</sup>

Even if we assume that the national authorities and courts can resist the national bias which some in the Commission feel they can,<sup>42</sup> one must recognize that competition law, and in particular the types of standards which the application of Art. 81(3) requires, will legitimately vary between societies and cultures. Legislation, by necessity, must be formulated in abstract language. Not even the most enlightened legislator is able to contemplate every factual constellation to which the statute he or she is drafting may apply. The entity charged with the application of that law in specific cases must by necessity be accorded a certain degree of discretion. In exercising that discretion, the person applying the statute unavoidably has recourse to his or her own expectations, knowledge and experience. These limitations, which are largely shaped by the social and cultural context in which that individual matured and operates, will unavoidably have an influence on the application of the legal norm in specific cases. For many years the Commission has distinguished the application of European competition law from U.S. antitrust law based on different social and cultural contexts in which the laws are applied. One wonders whether the cultural differences between Sweden and Greece, for example, are any less than those between the UK and the U.S. The diversity of the Member States will produce diverse outcomes of the application of the same legal norm.

---

<sup>38</sup> Article 5 Regulation 1/2003.

<sup>39</sup> Celine Gauer, Dorothe Dalheimer, Lars Kjolbye & Edde de Smilter, *Regulation 1/2003: A Modernized Application of EC Competition Rules*, 2003(1) COMPETITION POL'Y NEWSLETTER 3, 3 (2003).

<sup>40</sup> According to Arved Deringer, one of the European Parliamentarians having an important influence on the development of European competition law, “The broad wording of these conditions allows the Commission an especially wide latitude in evaluating and filling in numerous indefinite legal concepts.” ARVED DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (1968) at 134 ¶422

<sup>41</sup> Article 6 Regulation 17.

<sup>42</sup> Wouter Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17*, 24 *FORDHAM INT'L L. REV.* 1655, 1700 (2000-2001) (“I have no reason to suspect that the competition authorities of the fifteen Member States would not be sufficiently independent or professional to avoid bias in favour of national interests.”).

The second challenge arises out of the lack of guidance from the European courts interpreting the exception requirements of Article 81(3) of the EC Treaty. In contrast to the prohibition contained in Art. 81(1) or the Merger Control Regulation, the European courts have granted the Commission an extremely broad deference in the interpretation and application of Art. 81(3) of the EC Treaty.<sup>43</sup> The standard position of the courts is that they defer to the assessment of the Commission because the application of the requirements set forth in Art. 81(3) involves a “complex economic appraisal” which the Commission is in a better position to make.<sup>44</sup> According to the Court, its review of the Commission’s interpretation of Art. 81(3) “must be limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers.”<sup>45</sup> Consequently, there is very little case law upon which practitioners and national agencies can rely on to apply the broad requirements in individual cases. Although the Commission has issued guidelines for the application of the four requirements of Art. 81(3) of the EC Treaty,<sup>46</sup> even these guidelines are framed in very broad terms.

### *Preemption of National Law*

The EC Treaty establishes a legal system *sui generis* which is separate from the legal systems of the respective Member States. The Member States retain the authority to maintain their own laws applicable to competition between private firms. The parallel application of national and EU competition law to the same facts necessitates conflict rules governing the relationship between these two independent legal regimes. As part of the modernization process, the Commission introduced the rule that the Member States must apply the European competition rules to cases in which the national competition authorities intend to apply national competition law if there is at least a potential effect on trade between Member States.<sup>47</sup> In other words, at least two sets of laws will commonly apply to any anti-competitive conduct which has an effect on trade between Member States. Given the broad interpretation given to inter-state trade requirement by the Court<sup>48</sup> and Commission,<sup>49</sup> the parallel application of competition law will occur in a significant number of cases.

---

<sup>43</sup> See e.g. Case-T 65/98, *Van den Bergh Foods Ltd. v. Commission*, 2003 E.C.R. II \_\_\_ ¶135.

<sup>44</sup> Joined Cases 142/84 and 156/84, *BAT and Reynolds v Commission*, 1987 E.C.R. 4487 ¶62; Joined Cases T-213/95 and T-18/96, *SCK and FNK v. Commission*, 1997 E.C.R. II-1739, ¶190; Case T-395/94, *Atlantic Container Line AB v. Commission*, 2002 E.C.R. II - 875 ¶257; Case T-112/99, *Métropole télévision v. Commission*, 2001 E.C.R. II - 2459 ¶114; Case 26/76, *Metro v. Commission*, 1977 E.C.R. 1875 45,50; Cases T-39/92 and T-40/92, *CB and Europay v. Commission*, 1994 E.C.R. II-49.

<sup>45</sup> Case T-131/99, *Shaw v. Commission*, 2002 E.C.R. II - 2023 ¶38; Case T-231/99, *Colin Joyson v. Commission*, 2002 E.C.R. II - 2085 ¶36.

<sup>46</sup> Guidelines on the Application of Art. 81(3) of the EC Treaty, O.J. 2004 (C \_\_\_) \_\_\_.

<sup>47</sup> Article 3(1) Regulation 1/2003.

<sup>48</sup> The mere possibility to affect patterns of trade between Member States is sufficient to fulfill the inter-state trade requirement even if the conduct is limited to one Member State. Case T-22/97, *Kesko Oy v. Commission*, 1999 E.C.R. II-3775 ¶105; Case 322/81, *Michelin v. Commission*, 1983 E.C.R. 3461 ¶103; Case T-65/89, *BPB Industries and British Gypsum v. Commission*, 1993 E.C.R. II-389, ¶134; Joined Cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle plc v. Commission*, 2001 E.C.R. II-2035 ¶79; Case 56/65, *Société Technique Minière*, 1966 E.C.R. 281, 303.

<sup>49</sup> *Franco-Japanese Ballbearing Agreement*, O.J. 1974 (L 343) 19.

In the event of parallel application of Community and national law, the general principle is that Community law is superior to national law in the case of conflict. The critical issue involves determining when there is a conflict. The parallel application of two legal norms to the same facts presents numerous possible constellations. The cases in which the conduct is consistent with both European and national competition law do not present a problem. A greater challenge is when the application of the legal norms in specific cases derives differing results. If an agreement or concerted is permissible at the European level because it does not infringe Art. 81(1) of the EC Treaty, meets the requirements of Art. 81(3) EC Treaty or qualifies for an exemption under one of the block exemptions, national competition law may not be applied to prohibit such agreement or concerted practice.<sup>50</sup> This rule does not preempt the application of national laws which pursue a different objective. For example, national rules regulating unfair contract terms may still be applied by the Member States even though the agreement is consistent with Art. 81 of the EC Treaty. This preemption of national law does not apply, however, to unilateral anti-competitive conduct. The Member States may apply stricter national competition laws to unilateral conduct which may be consistent with Art. 82 of the EC Treaty.<sup>51</sup>

National competition authorities are not prohibited from applying their national competition law to a particular transaction which does not have an effect on trade between Member States. However, compliance with national competition law does not prevent the Commission from prohibiting the conduct based on European competition law.<sup>52</sup> If the conduct is, however, prohibited by European competition law but allowed by national law, the competition authorities of the Member States are required to apply the European competition law to prohibit the conduct provided that there is an effect on trade between Member States.

The parallel application of European competition law and national competition law by the same competition law authority presents the easy case. The devolution of enforcement responsibility to the Member States will result in multiple national authorities applying competition law to the same conduct. For example, the Commission retains the authority to apply the competition rules of the EC Treaty, but not the national competition rules. A permissive ruling by a national authority or court cannot preclude the Commission from taking action.<sup>53</sup> If the Commission has already issued a decision in the case applying Art. 81 or 82, the national authorities and courts are precluded from taking decisions which would run counter to the decision adopted by the Commission.<sup>54</sup> If the Commission has merely initiated a proceeding, but not issued a decision, the authorities of the Member States must also avoid giving decisions which would conflict with a decision contemplated by the Commission. To that effect, the national court may assess whether it is necessary to stay its proceedings.<sup>55</sup>

Decisions by the Commission accepting commitments offered by the parties are another problem area. Regulation 1/2003 does not preclude the possibility that the Commission open an investigation after the national authorities have concluded their investigation. Nor does it preclude the possibility that several Member States investigate the same conduct. The possibility

---

<sup>50</sup> Article 3(2) Regulation 1/2003.

<sup>51</sup> Article 3(2) Regulation 1/2003.

<sup>52</sup> Case T-67/01, *JCB Service v. Commission*, 2004 E.C.R. \_\_\_ ¶93.

<sup>53</sup> Case C-344/98, *Masterfoods Ltd. v. HB Ice Cream*, 2000 E.C.R. I-11369.

<sup>54</sup> Article 16(2) Regulation 1/2003.

<sup>55</sup> Article 16(1) Regulation 1/2003.

that the Commission and the national competition authority come to the same conclusion – that the conduct is prohibited under both European and national law – implicates the possibility of sanctioning firms twice for the same conduct. The principle *ne bis in idem* prevents the sanctioning of a person more than once for a single unlawful course of conduct based on the breach of a law which protects the same legal interest.<sup>56</sup>

Decisions by the Commission accepting commitments offered by the parties are another problem area. Regulation 1/2003 clarifies the authority of the Commission to settle cases with companies which are targets of investigations. If the Commission investigates specific conduct, and expresses its intention to order the parties to cease such conduct, the firms may offer commitments to the Commission to address the concerns of the Commission.<sup>57</sup> The Commission may then issue a decision accepting the commitments and that there are no longer grounds for action by the Commission. The decision of the Commission in such a case does not, however, preclude the Member States from investigating the same conduct. According to the preamble to Regulation 1/2003, “Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case.”<sup>58</sup>

### *Importance of Inter-state Commerce Requirement*

The introduction of Regulation 1/2003 will place renewed focus on the requirement for the application of Art. 81 that there be an effect on trade between Member States. As discussed above, the Member States, in applying their respective national competition laws to alleged anti-competitive conduct, are required to also apply Art. 81 of the EC Treaty if there is an effect on trade between Member States. As the Member States have separate legal norms regulating competition, the application of the requirement that EU competition law be applied to all transactions which have an effect on trade between Member States, could determine the outcome of the case. If, for example, the application of national competition law would prohibit certain conduct, but that same conduct be permissible under EU law, all the parties need to do is to establish an effect on trade between Member States.

Although the Commission has issued a notice clarifying the inter-state trade requirement,<sup>59</sup> the Commission cannot alter the interpretation given to this requirement by the European courts. The principle of legal certainty may even limit the Commission from altering its own broad interpretation applied in previous decisions. The problem is that, similar to the inter-state commerce requirement of the Sherman Act, this requirement has been largely treated as a mere formality by the European Commission and the courts. In the past, if the Commission or the courts were of the opinion that the particular conduct at issue amounted to an appreciable restraint of competition, it was unlikely that the requirement of an effect on trade between Member States would prevent the Commission or the court from prohibiting the conduct. The

---

<sup>56</sup> Joined Cases C-204/00P, C-205/00P, C-211/00P, C-213/00P, C-217/00P & C-219/00P, *Aalborg Portland v. Commission*, 2004 E.C.R. \_\_\_\_ ¶338; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV v. Commission*, 2002 E.C.R. I - 8375 ¶59.

<sup>57</sup> Art. 9(1) Regulation 1/2003. This authority would not apply in cases where the Commission intends to impose a fine, for example price cartels or other hard core restraints. See Preamble 13 of Regulation 1/2003.

<sup>58</sup> Preamble 13 Regulation 1/2003.

<sup>59</sup> O.J. 2004 (C\_\_\_\_) \_\_\_\_.

standard therefore became whether it may have an influence direct or indirect, actual or potential, on the pattern of trade between Member States.<sup>60</sup> According to the Court, “it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct is capable of having such an effect.”<sup>61</sup>

The reliance on this broad standard served the objectives of the Commission and the courts at the time. It was, in part, prompted by the recognition that most of the Member States did not have a functioning competition law regime, and the necessity of maintaining some uniformity in the regulation of competition throughout the Community. Until the introduction of the European Competition Network,<sup>62</sup> there was no formal mechanism by which to coordinate the application of national competition laws. Moreover, the European courts, in recognition of the necessity for the Commission to establish itself as an effective regulatory body, gave the Commission broad deference in the application of the requirement. Now, however, things have changed. All the Member States have adopted competition laws and the courts have exhibited a greater willingness to scrutinize the decisions of the Commission.<sup>63</sup> European competition law is nonetheless stuck with the broad interpretation of the inter-state trade requirement.

Similar to the U.S., the broad interpretation of the inter-state trade requirement together with the preemption rules discussed above will have the effect of relegating the importance of national competition laws to a separate league. National competition authorities will be forced to familiarize themselves with European competition law thereby diverting attention from the national laws. Whether this will be a positive development remains to be seen. It will, however, make the European system similar to the federalist antitrust law system in the U.S.

The potential problem concerns the lack of uniformity between the Member States in the application and enforcement of their respective competition laws. Not only do the legal norms and the social contexts in which the application of national competition law will occur differ between Member States, there is a clear difference in the administrative and judicial enforcement practices of the Member States. The applicability or inapplicability of European competition law to particular conduct may determine the outcome of the case. As the applicability of competition law will depend on whether there is an effect on trade between Member States, this requirement will become an important consideration in the forum shopping of private practitioners.

---

<sup>60</sup> Case T-202/98, *British Sugar v. Commission*, 2001 E.C.R. II - 2035 ¶78; Case 42/84, *Remia v Commission*, 1985 E.C.R. 2545 ¶22; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö v. Commission* 1993 E.C.R. I-1307 ¶143; Commission Decision of 24 July 2002, O.J. 2003 (L 84) 1, 43 ¶363; Commission Decision of 11 December 2001, O.J. 2001 (L 15) 1, 27 ¶154.

<sup>61</sup> Case T-86/95, *Compagnie Générale Maritime v. Commission*, 2002 E.C.R. II-1011 ¶145; Case T-29/92 *SPO v. Commission*, 1995 E.C.R. II-289 ¶235.

<sup>62</sup> See Notice on the European Competition Network, O.J. 2004 (C \_\_\_\_ ) \_\_\_\_.

<sup>63</sup> See e.g. Case T-67/01, *JCB Service v. Commission*, 2004 E.C.R. \_\_\_\_ (Jan. 13, 2004); Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure eV v. Commission*, 2004 E.C.R. \_\_\_\_; Case T-5/02, *Tetra Laval BV v. Commission*, 2002 E.C.R. II-4381; Case T-310/01, *Schneider Electric SA v. Commission*, 2002 E.C.R. II-4071; Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585.

## Internationalization, Harmonization and Convergence of Competition Laws

Internationalization and harmonization are sometimes discussed as solutions for the problem caused by the extraterritorial application of competition laws.<sup>64</sup> The source of the conflict is the parallel application of the competition laws of two or more states to the same conduct where the application results in divergent legal conclusions.<sup>65</sup> The term “extraterritorial application of law” has unfortunately and unnecessarily assumed a pejorative character. It suggests an illegitimate extension of the traditional bases of jurisdiction. The principle of territoriality has served as the fundamental basis of jurisdiction in international law.<sup>66</sup> The jurisdiction of a state to apply its law was traditionally limited to the geographic territory over which that state held sovereignty. Even in the U.S., the Supreme Court initially required the conduct to have occurred in the U.S. for the Sherman Act to be applicable.<sup>67</sup> The effects which competition laws are intended to prevent, however, may occur in an entirely different state than where the perpetrators are located. The pure application of the territoriality principle of international law would allow companies to engage in anti-competitive practices without punishment as long as they were not present in the state in which their conduct had an effect. However, the regulation of anti-competitive business practices is concerned with the location of the effects of those practices rather than the location of the actors.

The U.S. was the first legal system with a mature competition law to realize and address the jurisdictional challenge presented by legal norms regulating competition. In *U.S. v. Aluminum Co. of America*, the Second Circuit held that the U.S. courts had jurisdiction over foreign defendants as long as the foreign conduct was intended to and actually did affect U.S. commerce.<sup>68</sup> The application of the “effects test”, as it became known in the U.S., was subsequently approved by the U.S. Supreme Court in *Hartford Fire Insurance Co. v. California*.<sup>69</sup>

The extraterritorial application of U.S. antitrust law attracted significant criticism<sup>70</sup> and response from the Europeans in the form of blocking statutes.<sup>71</sup> However, once the Europeans

---

<sup>64</sup> See Spencer Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U.L. Rev. 343 (1997); Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911 (2003); Brian Peck, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict -- An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 San Diego L. Rev. 1163 (1998).

<sup>65</sup> It should be noted, however, that the mere extraterritorial application of a state's laws may create political conflict even where the application of the substantive legal norms leads to the same conclusion or even where there is no parallel application of laws due to the fact that the second state does not have a law applicable to the particular conduct. This is because the application of foreign law to conduct occurring within another country creates the appearance of an infringement of the sovereignty of that state.

<sup>66</sup> Gehard Kegel & Ignaz Seidl-Hohenveldern, *On the Territoriality Principle in Public International Law*, 5 HASTINGS INT'L & COMP. L. REV. 245 (1981)

<sup>67</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *In Foley Bros. v. Filardo*, 366 U.S. 281, 285 (1949).

<sup>68</sup> 148 F.2d 416 (2d Cir 1945).

<sup>69</sup> *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

<sup>70</sup> See e.g. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159-60 (1957); Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 100-08 (1964); Verzijl, *The Controversy Regarding the So-called Extraterritorial Effect of the American Antitrust Laws*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 3 (1961).

became serious about the application of their competition rules, they too faced the same dilemma caused by a strict application of the territoriality principle. Initially the EC avoided having to rely on the effects doctrine by adopting the economic unit theory: if a company had affiliated companies in the Community, it was deemed to be present in the Community.<sup>72</sup> This was considered consistent with the territoriality principle because it was based on physical location. This solution soon proved to be inadequate. An anticompetitive practice may be engaged in by companies entirely outside the EC and which have no subsidiaries or affiliates in the EC. In *Åhlström Osukeyhtiö v. Commission*, the ECJ introduced a new concept designed to address this shortcoming.<sup>73</sup> In that case, the ECJ recognized that the actual location of the parties or their subsidiaries was not the decisive criterion in delineating the jurisdictional reach of the European competition laws. As long as the conduct was “implemented” in the Community, the Commission and European courts could legitimately assert jurisdiction over the conduct.<sup>74</sup> The implementation requirement is simply another name for the effects test. It is unlikely that the Commission or ECJ would conclude that the Commission did not have jurisdiction over conduct which had an anti-competitive effect in Europe because it was not implemented there. It is difficult to see how a business practice could have an anti-competitive effect without being implemented in that same area.

Reliance on the effects/implementation test to delineate the scope of application of competition laws appears to have become a generally accepted principle.<sup>75</sup> The extension of jurisdiction based on the location of the effects creates the potential of the parallel application of competition laws to the same conduct as anti-competitive conduct may have negative effects or may be implemented in more than one jurisdiction. Not only does the extraterritorial application of competition law in itself cause animosities, divergent legal conclusions resulting from the application of national legal norms to particular business conduct often result in legal and political friction.<sup>76</sup>

Internationalization and harmonization describe different forms of multi-lateral or bilateral solutions to address the divergent consequences of the parallel application of two or more legal norms to the same conduct. Internationalization refers to the adoption of a supra-national set of directly applicable laws. In the context of competition law, for example, it

---

<sup>71</sup> Deborah A. Sabalot, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213 (1982).

<sup>72</sup> Case 48/69, *ICI*, 1972 E.C.R. 619, 664; Case 7/73, *Commercial Solvents*, 1974 E.C.R. 223, 255.

<sup>73</sup> Joined cases 89, 104, 114, 116-117 and 125-129/85, *Åhlström Osukeyhtiö v. Commission*, 1988 E.C.R. 5193.

<sup>74</sup> Joined cases 89, 104, 114, 116-117 and 125-129/85, *Åhlström Osukeyhtiö v. Commission*, 1988 E.C.R. 5193 at ¶16; The ECJ subsequently extended this reasoning to the application of the Merger Control Regulation, Case T-102/96, *Gencor v. Commission*, 1999 E.C.R. II-2585.

<sup>75</sup> See e.g. Case 12/CAC/DEC01, *American Soda Ash Corp. v. Competition Commission of South Africa* (24 Oct. 2002) (South African Competition Appeal Court recognized the application of the effects test under international law.); *Amino Acids*, O.J. 2001 (L 152) 24.

<sup>76</sup> See e.g. Giotakos, Petit, Garnier & De Luyck, *General Electric/Honeywell – An Insight into the Commission’s Investigation and Decision*, 2001(3) COMPETITION POLICY NEWSLETTER 5; Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. TIMES, July 18, 1997, at D2; Sondra Roberto, *The Boeing/McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers*, 24 BROOKLYN J. INT’L L. 593, 616 (1998); See Willian Drozdziak, *European Union Kills GE Deal*, WASH. POST, July 4, 2001 at A1; Kevin Done, *Dispute over GE Takeover Deepens*, FIN. TIMES, June 19, 2001, at 1; John DeQ. Briggs & Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell*, 16 ANTITRUST 26 (Fall 2001); Donna Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18, 20 (2001)

commonly refers to the adoption of a single competition law regime applicable in each state.<sup>77</sup> Harmonization, on the other hand, refers generally to the process by which national legal norms are assimilated with one another. In contrast to internationalization, each state retains its own domestic laws applicable to the particular conduct. The term harmonization implies the retention of national laws with modifications to harmonize them with the laws of the other states.

Some observers distinguish between hard harmonization and soft harmonization.<sup>78</sup> Hard harmonization is used to refer to the creation of supra-national legal norms regulating competition. This is essentially the same as internationalization as discussed above. The term “soft harmonization” is commonly used to describe the intentional approximation of substantive or procedural rules.<sup>79</sup> A commonly-cited example of soft harmonization is the assimilation of national laws to the various non-binding model codes or best practices guidelines issued by the OECD.

This definition of soft harmonization fails to capture the influenced but unintentional approximation of laws which often occurs but is more difficult to detect. If harmonization includes the agreed-upon changing of laws to conform with one another, a third phenomenon “convergence” should be mentioned as it also contributes to the reduction of the risk of friction resulting from the parallel application of competition laws to the same conduct. For example, the divestiture policy of the U.S. Federal Trade Commission had a strong influence on the EU approach to remedies in merger cases.<sup>80</sup> The introduction of a leniency policy<sup>81</sup> and efficiency considerations<sup>82</sup> in EU competition and merger law may also be cited as examples of convergence. Although the modernization of the EU competition laws has not been characterized as or undertaken for the purpose of harmonization or convergence, its effect is to move the European system more into line with that of the U.S. Consequently, the modernization should assist in reducing the private inefficiencies and political disputes which periodically arise from the parallel application of EU and U.S. antitrust law.

---

<sup>77</sup> European Commission, *Towards an International Framework of Competition Rules*, COM 284 (1996) available at <http://www.europa.eu.int/comm/competition/international/com284.html>; Philip Marsden, *A COMPETITION POLICY FOR THE WTO* (2003); Aaditya Matoo & Arvind Subramanian, *Multinational Rules on Competition Policy – A Possible Way Forward*, 31 J. WORLD TRADE 5 (2002); Ernst-Ulrich Petersman, *Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System*, 49 AUSSENWIRTSCHAFT 231 (2000); Henning Wins, *Eine internationale Wettbewerbsordnung als Ergänzung zum GATT* (2000); Wolfgang von Meibom & Andreas Geiger, *A World Competition Law as an Ultima Ratio*, 23 EUR. COMP. L. REV. 445 (2002).

<sup>78</sup> Diane P. Wood, *Soft Harmonization Among Competition Laws: Track Record and Prospects*, 48 ANTITRUST BULL. 305 (2003); Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT’L L. 391, 404 (2002); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277 (1992).

<sup>79</sup> E. Fox, *The Central European Nations and the EU Waiting Room*, 23 BROOKLYN I. INT’L L. 351, 359 (1997-1998); D. Wood; E. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. I, 16 (1997). H. Kötz, *Rechtsvereinheitlichung – Nutzen, Kosten, Methode, Ziele*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 50 (1986): 1-18, Diane P. Wood, *Soft Harmonization and Competition Laws: Track Record and Prospects*, 48 ANTITRUST BULL. 305(2003).

<sup>80</sup> Mario Monte, *Antitrust in the US and Europe: A History of Convergence*, SPEECH/01/540 at 8.

<sup>81</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, O.J. 2002 (C 45) 3; Dept. of Justice, *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶13,113 (Aug. 10, 1993).

<sup>82</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2004 (C 31) 5.

## Modernization as Convergence

Although the European Commission has welcomed efforts to harmonize U.S. and European law, convergence was clearly not the objective of the reform efforts. However, it does have this effect in subtle ways. As discussed above, the U.S. Supreme Court adopted a holistic approach to determining whether particular conduct constituted a restraint of competition. Except for conduct which was so pernicious that it could not have any redeeming characteristics and is deemed to be *per se* anti-competitive,<sup>83</sup> business conduct is only deemed anti-competitive after an analysis of all relevant aspects of the conduct.<sup>84</sup> As vague as it may seem to Europeans, reasonableness is the dominant standard.

The traditional European approach was much different. The prohibition of anti-competitive conduct codified in Art. 81(1) of the EC Treaty has traditionally been interpreted very broadly. In applying this part of Art. 81, the Commission, with the approval of the Community courts, refused to consider whether the conduct at issue as a whole was anti-competitive. Only the potential negative characteristics of the conduct were considered at this stage in the analysis. Even conduct which served to increase competition on the relevant market was nonetheless prohibited by paragraph (1) of Art. 81 of the EC Treaty. The redeeming characteristics were irrelevant at this stage of the analysis.<sup>85</sup>

It was only once the parties entered the realm of Art. 81(3) of the EC Treaty that the pro-competitive aspects became relevant.<sup>86</sup> But one could not enter this realm until the parties submitted a costly and time consuming notification to the European Commission.<sup>87</sup> This bifurcated system unfortunately caused a misallocation of scarce administrative resources and imposed significant compliance costs on firms. Two companies who wanted to cooperate to develop a new product or engage in joint marketing activities, were often forced to expend time and financial resources on filing a notification – and the Commission was likewise obligated to expend resources to review it even if the cooperation were pro-competitive.

The central component of the modernization program will be to eliminate this bifurcated system of application of Art. 81 of the EC Treaty. As in the U.S., whether particular business conduct amounts to a restraint of competition will require a simultaneous examination of both the negative and positive effects of that conduct. This convergence with the U.S. system may assist in the reduction of friction between the U.S. and Europeans in the antitrust arena. In the

---

<sup>83</sup> *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979).

<sup>84</sup> *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *National Soc'y of Prof'l Engineers v. U.S.*, 435 U.S. 679, 690 (1978).

<sup>85</sup> Case T-112/99, *Métropole télévision*, 2001 E.C.R. II-2459.

<sup>86</sup> One apparently incoherent aspect of the modernization program is the allocation of the burden of proof. Although the Commission is required to prove the existence of an infringement of Art. 81(1) of the EC Treaty, once this is accomplished, the parties bear the burden of proving that the requirements of Art. 81(3) are fulfilled. Notice on the Application of Article 81(3), O.J. 2004 (C \_\_\_) \_\_\_. If, as is recognized by the Commission, the pro-competitive aspects of the conduct are not considered in the application of Art. 81(1), this allocation of the burden of proof requires parties to a pro-competitive agreement to prove that their conduct is pro-competitive. It is one thing proving the existence of efficiencies; it is quite another proving a negative, i.e. that a particular agreement is not indispensable to achieving those efficiencies.

<sup>87</sup> The block exemptions served as interim relief and could be viewed as merely the first step to a holistic approach to the application of Art. 81 of the EC Treaty.

pre-modernization age, many U.S. practitioners and businesses objected to the bi-furcated system employed by the Commission. They could not understand the necessity of having to notify a pro-competitive transaction and incurring the consequent scrutiny of the European regulators. This alternative approach to the implementation of competition law was perceived as not being business-friendly. It consequently clouded the legitimacy of European competition law and created the general perception that European competition law was inefficient and susceptible to bias. In the post-modernization age, the approaches taken by businesses and their legal advisors will be substantially similar. The fundamental task will be to determine whether a particular business conduct is in the aggregate pro-competitive. It will not eliminate the potential for different outcomes to the application of the substantive standard, but it will contribute to enhancing the reputation of European competition law in the U.S.

## **Conclusion**

Although modernization of law can be a legitimate response to social changes for which the existing legal norms are inadequate,<sup>88</sup> it can be used as a guise for changing the legal status quo to achieve concrete political objectives. Some have argued that the modernization program initiated by the Commission has the dubious effect of centralizing enforcement around the Commission.<sup>89</sup> Although the relegation of national competition law is predicted, this essay is not meant to suggest any illegitimate motives behind the modernization process in the EU. Regardless of the objectively demonstrable intent of the promoters of the legislative reforms which constitute the modernization process, one effect of modernization is to achieve a greater degree of harmonization with U.S. antitrust law.

---

<sup>88</sup> See Arthur T. Vanderbilt, *The Modernization of the Law*, 36 CORNELL L.Q. 433, 433 (1951) (“The necessity for the continuous adaptation of the law to the needs of time, if the law is not eventually to break down, is a fundamental problem deserving of extensive consideration.”).

<sup>89</sup> See Alan Riley, *EC Antitrust Modernization: The Commission Does Very Nicely Thank You!*, 2003 EUR. COMP. L. REV. 604 (suggesting that the Commission has effectively centralized enforcement around itself).